91-816

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK; EDWARD V. REGAN, Comptroller of the State of New York; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

—against—

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Where state officials, in order to phase in a statute imposing a two-week lag on the payment of wages earned by certain state employees, withheld from the affected employees one day's salary for each of ten consecutive two-week pay periods, does a federal court order which looks backwards and directs restitution of the previously withheld wages constitute retroactive monetary relief barred by the Eleventh Amendment.

LIST OF PARTIES

The parties to the proceedings below were 1) petitioners the State of New York; Edward V. Regan, as Comptroller of the State of New York; and Robert Abrams, as Attorney General of the State of New York, and 2) respondents Association of Surrogates and Supreme Court Reporters within the City of New York; Mary O'Leary, President; Citywide Association of Law Assistants, Barbara Brown, President; Court Attorneys Association of the City of New York, Robert A. Mulhall, President; Court Officers Benevolent Association of Nassau Co., Jeffrey Pollack, President; District Council 37, American Federation of State, County & Municipal Employees & Local 1070, Paul Shelkin, President; Local 704, Service Employees International Union, John Walsh, President; New York State Supreme Court Officers Association, ILA, Local 2013, AFL-CIO, John McKillop, President; Ninth Judicial District Court Employees Association, Martin Sharp, President; Suffolk County Court Employees Association, Inc., Thomas F. McGuinness, President; The Communication Workers of America, AFL-CIO, Local 1180, Arthur Cheliotes, President; Civil Service Forum Local 1300, SEIU, Salvatore Cangiarella, President; Janet Foster; Susan Glasbrenner; Michael Sullivan; David Richman; Greg Snigor; James DiNapoli; William Rosario; Abel Peltro; George F. Berghorn; and Lisa Rosenzwig. The New York State Unified Court System and Matthew T. Crosson, Chief Administrator of the Unified Court System, were appellees in the court below. They do not now seek review of the judgment below and are not therefore named as parties herein.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. _____

STATE OF NEW YORK; EDWARD V. REGAN, Comptroller of the State of New York; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

—against—

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on July 31, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 940 F.2d 766 (2d Cir. 1991) and is reproduced in the appendix to this petition at 1a-20a. The opinion by the New York State Court of Appeals (rendered upon certification by the Second Circuit of an unsettled question of law) is reported at 78 N.Y.2d 143 (1991) and is reproduced in the appendix at 21a-33a. The opinion of the United States

District Court for the Southern District of New York (Patterson, J.) is reported at 749 F. Supp. 97 (S.D.N.Y. 1990) and is reproduced in the appendix at 34a-42a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 31, 1991. A timely rehearing petition was denied on August 21, 1991 (43a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Act of May 25, 1990, ch. 190, § 375(b), 1990 N.Y. Laws 587 provides:

> (1) Notwithstanding the provisions of subdivision a of this section or of section 200 of the state finance law, commencing with the last bi-weekly payroll period ending at least fourteen days before March 31, 1991 for each nonjudicial officer or employee, the salary or wages of such officer or employee shall be payable by the state two weeks after they shall have become due. Until such time, an alternative procedure for payment of the salaries and wages, to be determined by the comptroller, may be implemented in lieu of the procedure specified in subdivision 1 of such section 200 or in other provisions of law. The procedures set forth in this paragraph (including any alternative procedure determined by the comptroller) shall remain in effect until the state and an employee organization representing nonjudicial

officers and employees who are in positions which are in collective negotiating units established pursuant to article 14 of the civil service law enter into an agreement providing otherwise for the payment of salaries and wages to such officers and employees.

(2) The provisions of paragraph 1 of this subdivision shall not apply to any alternative procedures for the payment of salaries and wages to nonjudicial officers and employees that was adopted pursuant to law and in effect immediately preceding the effective date of this subdivision.

STATEMENT OF THE CASE

A. New York's Lag Payroll Law

In December, 1989, the New York State Unified Court System requested a judiciary budget of $972.9 million for the fiscal year running from April 1, 1990 to March 31, 1991. The proposed budget included a request for 505 new nonjudicial positions for existing court operations, 350 new positions for new court parts and 32 new judgeships (JA. 94-95).[1]

Facing a fiscal crisis (JA. 57), the New York State Legislature reduced the judiciary's budget request by $69.1 million. As approved, the budget provided for 308 of the new positions that were sought for on-going court operations and $21.9 million in other personal service funds (JA. 95).

As part of the budget plan, the Legislature sought to finance the new positions, in part, by enacting a "lag payroll" statute affecting the nonjudicial employees of the Unified Court System. *See* Act of May 25, 1990, ch. 190, § 375(b), 1990 N.Y. Laws 587. The Legislature anticipated that implementation of the lag payroll would save the State approximately $7 million (JA. 95).

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1 References to "(JA. ___)" are to the Joint Appendix filed in the Court of Appeals.

Under the statute, the salaries of the affected employees were not to be paid until two weeks after they became due. Because the employees were otherwise paid their bi-weekly salaries every second Wednesday for the preceding ten-day work period, implementation of the statute required that ten days of salary be withheld at some point prior to the commencement of the lag. The monies thus withheld would represent savings to the State.

The statute provided that the lag was to commence with the last bi-weekly payroll period ending at least fourteen days before March 31, 1991. To phase in the two-week lag by this period, the New York State Comptroller, as authorized by the statute, adopted an "alternative procedure" for paying salaries so that 10 days of wages would be withheld prior to the commencement of the lag (JA. 56).

Under this procedure, the affected employees were paid nine days' salary for the ten days worked in each pay period for ten two-week periods beginning November 7, 1990. Thus, by the time the two-week lag commenced on March 14, 1991, a total of ten days' salary had been withheld from the affected employees. For each pay period thereafter, the employees were paid their full ten days' salary. Under the statute, the withheld salary was to be paid to the employees at the termination of their employment with the State at the rate of pay applicable to them at the time of termination.

B. Proceedings Below

Respondents commenced this action in the Southern District of New York on or about October 4, 1990 (JA. 4). Each of the eleven individual respondents is a court employee affected by the lag payroll and each of the eleven respondent labor organizations is a party to a three-year collective bargaining agreement with the Unified Court System (JA. 7-8).

The complaint alleged that the lag payroll statute violated the contract clause, U.S. Const., art. I, § 9, cl. 3, by abrogating the contractual rights of the affected employees to receive bi-weekly salaries and wages based upon ten working

days, and violated the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. The respondents sought 1) a declaration that the lag payroll statute was unconstitutional; 2) an injunction prohibiting petitioners from implementing the lag payroll; and 3) damages in the form of restitution of any salary withheld pursuant to the lag payroll (JA. 13-14).

By judgment dated October 26, 1990, the district court (Patterson, J.) granted summary judgment to the petitioners. In its opinion (JA. 144), the court rejected respondents' claim that payment under the temporary lag payroll for only nine rather than ten days was an unconstitutional legislative impairment of contract. In doing so, the court relied on a provision in the employees' collective bargaining agreements stating, in language required by N.Y. Civil Service Law § 204-a(1) (McKinney 1983), that any provision of the agreement requiring legislative action to permit its implementation will not become effective until the appropriate legislative body has given approval. The court interpreted this provision to mean that respondents' contractual rights to payment do not come into existence until the Legislature has appropriated funds to pay those salaries. Accordingly, the court held that since no contractual obligation existed at the time of the enactment of the lag payroll law, there was no legislative impairment of contract. The court also found that even if its interpretation of section 204-a(1) were incorrect, any impairment of contractual rights by the lag payroll statute was reasonable and necessary to further an important public purpose under the test enunciated in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25 (1977).

Finally, the court denied respondents' due process and equal protection claims on the grounds that the imposition of the lag payroll was rationally related to the State's legislative interest in resolving the budget crisis, and that respondents had no clear entitlement to payment of salary every second Wednesday for the preceding ten work days (JA. 152-153).

On appeal to the Second Circuit, the respondents raised only their contract clause challenge to the lag payroll statute. Noting that the district court's interpretation of New York Civil Service Law § 204-a(1) conflicted with a decision of a lower New York State court, the Second Circuit (45a-52a) certified the following question—pursuant to 2d Cir. R § 0.27 and 22 NYCRR 500.17—to the New York State Court of Appeals:

> Does N.Y. Civ. Serv. Law § 204-a(1) make the compensation sections of collective bargaining agreements to which it applies conditional upon or subject to annual legislative appropriations?

The Court of Appeals accepted certification and answered the question in the negative (21a-33a). Noting that section 204-a(1) is part of article 14 of the Civil Service Law, also known as the Taylor Law, the Court of Appeals concluded that the district court's interpretation conflicted with the Taylor Law's twin goals of protecting collective bargaining rights and encouraging multi-year contracts. Accordingly, the court held that the collective bargaining agreements became valid when ratified.

Given the Court of Appeals' disposition of the certified question, the Second Circuit found that the district court's holding that there was no contractual impairment was erroneous as a matter of New York law (10a). The court further determined that the impairment was unconstitutional because it was not "reasonable and necessary" to serve the important public purpose of financing the maintenance and expansion of the New York court system. According to the court, the State could have otherwise allocated an additional $7 million to the judiciary budget by either shifting this amount from another governmental program or raising it through taxes. The Second Circuit concluded that the State, having instead imposed a payroll lag on a "few employees of the judicial branch," impermissibly impaired the contractual rights of these employees (16a).

In addition, the court rejected the argument of petitioners State of New York, Regan and Abrams that 1) respondents' claim for declaratory judgment and injunctive relief was moot as of the date, March 13, 1991, that a total of 10 days' salary had been withheld from the affected employees and 2) an order directing restitution of the withheld wages would constitute retroactive monetary relief barred by the Eleventh Amendment (18a-19a). As to mootness, the court held that although two weeks' salary had already been withheld, the lag payroll continued to impair the State's contractual obligations by deferring payment for a period of two weeks until the employee leaves the service of the State. As to the Eleventh Amendment, the court concluded (19a) that petitioners could be directed to restore monies to the affected employees " 'in order to shape their official conduct to the court's decree' " (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 [1974]). The court held that since an order of restitution was merely ancillary to the order enjoining the prospective implementation of the lag payroll statute, it was permissible under *Edelman*.

Accordingly, the Second Circuit reversed the judgment of the district court and remanded the case with instructions to 1) enter a declaratory judgment declaring that the lag payroll statute violates the contract clause, 2) enjoin the continuing effects and application of the statute and 3) enter judgment for the respondents which shall include restitution of the lagged wages for all affected employees (20a).

Thereafter, a petition for rehearing was filed with the suggestion for rehearing in banc. The petition was denied on August 21, 1991 (43a).[2]

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2 By order to show cause, defendant Matthew T. Crosson, the Chief Administrator of the Unified Court System, subsequently moved for an order entering judgment which would direct the New York State Comptroller to pay the withheld monies out of funds appropriated to the Judiciary in its 1990-1991 budget, as opposed to its 1991-1992 budget. By judgment dated August 29, 1991, the district court (Patterson, J.) granted the motion. Petitioners have filed a timely notice of

REASONS FOR GRANTING THE PETITION

In *Edelman v. Jordan*, 415 U.S. at 677, this Court held that "a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . and may not include a retroactive award which requires the payment of funds from the state treasury." Here, however, the Second Circuit has ordered the State and its officials to pay nonjudicial employees of the Unified Court System all monies which they had previously withheld from them in their implementation of the lag payroll system. The Second Circuit mistakenly concluded that because it was prospectively enjoining the operation of the lag payroll statute, additional relief making the employees whole was ancillary to the prospective relief and thus, under *Edelman*, permissible even though it looks backwards and requires the retroactive payment of monies from the New York State treasury. Because this order effectively ignores the significant protection which the Eleventh Amendment affords to states whose officials are sued in a federal forum, and because the Second Circuit's decision is inconsistent with decisions of this Court and other courts of appeal, review by this Court is warranted.

Under *Edelman* and its progeny, the courts have consistently found that where a state has withheld monies or failed to pay an amount allegedly due, a request for payment of these funds past due is a request for retroactive monetary relief barred by the Eleventh Amendment.[3] The monetary

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appeal from this judgment. In the interim, the State Comptroller, on October 23, 1991, paid the affected employees the salaries which had been withheld from them. Respondents were expressly informed by letter that restitution of the lagged wages was made without prejudice to petitioners' right to recover the amount paid should there be a reversal of the Second Circuit's July 31, 1991 order.

3 *See, e.g., Fla. Dept. of Health and Rehabilitative Services v. Fla. Nursing Home Assoc.*, 450 U.S. 147, 149-150 (1981) (nursing home

relief which the plaintiffs in this case have obtained is plainly a retroactive award. The funds in question represent salaries which were, prior to the court's decision, withheld from state employees. The restitution to the affected employees of their wages past due can only be "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials." *Edelman*, 415 U.S. at 668. As such, the relief is barred by the Eleventh Amendment because it represents "the award of an accrued monetary liability . . ." *Id.* at 663-664.

In its decision, the Second Circuit recognized that the monetary relief which it awarded was attributable to past conduct. Thus, the court noted that "a total of two weeks' salary *has already been withheld.*" (18a) (emphasis added). The court nevertheless believed that the presence of prospective relief provided the basis for awarding retroactive relief. Thus, the Second Circuit concluded that since it was directing prospective relief in the form of an injunction against the lag payroll statute, an order requiring the state defendants to restore the withheld monies to the affected employees would

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may not, under the Eleventh Amendment, obtain reimbursement for previous Medicaid underpayment); *Mosley v. Hairston*, 920 F.2d 409 (6th Cir. 1990) (Eleventh Amendment bars recovery from the State of AFDC payments improperly withheld in the past); *Lenea v. Lane*, 882 F.2d 1171 (7th Cir. 1989) (back pay to prisoner for work assignments lost prohibited by Eleventh Amendment); *Hernandez-Tirado v. Artau*, 874 F.2d 866 (1st Cir. 1989) (government official wrongfully demoted may not, under the Eleventh Amendment, obtain back pay); *Reed v. Bullock*, 872 F.2d 671 (5th Cir. 1989) (state employee barred from receiving back pay); *Cotton v. Mansour*, 863 F.2d 1241 (6th Cir. 1988), *cert. denied*, 110 S. Ct. 835 (1990) (retroactive payment for food stamps wrongfully withheld barred by the Eleventh Amendment); *Reed v. Health and Human Services*, 774 F.2d 1270 (4th Cir. 1985) (recovery of AFDC benefits wrongfully denied prohibited by Eleventh Amendment); *Caldwell v. Wallace*, 755 F.2d 870 (11th Cir. 1985) (Medicaid benefits wrongfully denied).

be permissible as an "ancillary" effect of this prospective relief, as that term was employed by this Court in *Edelman*.[4]

The fact that prospective relief has been ordered, however, does not mean that retroactive monetary relief may be awarded. In *Edelman*, this Court held that a federal court order requiring the payment of funds from the state treasury is permissible only if such payment "is a necessary consequence of compliance in the future with a substantive federal-question determination", 415 U.S at 668, the cost of such compliance being "ancillary" to the prospective order, *id.*

In this respect, the Second Circuit notably failed to explain how payment from the state treasury of the withheld salaries is a "necessary consequence" of the State's compliance in the future with an injunction prohibiting the operation of the lag payroll law. Indeed, it is not such a necessary consequence of the injunction. The State's compliance with such an injunction is entirely accomplished by ensuring that after the date of the injunction, employees are paid for work done during the immediately preceding two-week pay period. The return of monies previously withheld is thus simply not ancillary to prospective relief.

To be sure, such compliance with the injunction does not satisfy the respondents' primary interest in being paid the two weeks' salary which had been previously withheld. Nevertheless, this Court has never held that the authority of a federal court to order relief ancillary to a prospective remedy may include a retroactive monetary award, despite the fact that, absent such a monetary award, the complainants would not otherwise be made whole.

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4 In other cases, the Second Circuit has held that the Eleventh Amendment bars the recovery of monies which the State, as here, previously withheld. *See, e.g., Tekkno Laboratories, Inc. v. Perales*, 933 F.2d 1093 (2d Cir. 1991) (payments to Medicaid provider withheld pending investigation); *Dwyer v. Regan*, 777 F.2d 825 (2d Cir. 1985), *modified*, 793 F.2d 457 (2d Cir. 1986) (state employee terminated from job without a prior hearing could not, under Eleventh Amendment, recover back pay). In those cases, however, prospective relief was not available.

The Second Circuit's decision is inconsistent with the principle that the Eleventh Amendment prohibits relief which "in essence serves to compensate a party injured in the past by an action of a state official in his official capacity". *Papasan v. Allain*, 478 U.S. 265, 278 (1985). Retroactive monetary relief may not be awarded against such a state official merely because prospective injunctive relief is available.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED

Dated: New York, New York
November 19, 1991

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1167—August Term 1990

Argued: March 8, 1991

Question Certified: March 22, 1991

Submitted After
Answer to Certified Question: June 27, 1991

Decided: July 31, 1991

Docket No. 90-9036

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK, Mary O'Leary, President; CITYWIDE ASSOCIATION OF LAW ASSISTANTS, Barbara Brown, President; COURT ATTORNEYS ASSOCIATION OF THE CITY OF NEW YORK, Robert A. Mulhall, President; COURT OFFICERS BENEVOLENT ASSOCIATION OF NASSAU CO., Jeffrey Pollack, President; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES & LOCAL 1070, Paul Shelkin, President; LOCAL 704, SERVICE EMPLOYEES INTERNATIONAL UNION, John Walsh, President; NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION, ILA, LOCAL 2013, AFL-CIO, John McKillop, President; NINTH JUDICIAL DISTRICT COURT EMPLOYEES ASSOCIATION, INC., Martin Sharp, President; SUFFOLK COUNTY COURT

EMPLOYEES ASSOCIATION, INC., Thomas F. McGuinness, President; THE COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1180, Arthur Cheliotes, President; CIVIL SERVICE FORUM LOCAL 300, SEIU, Salvatore Cangiarella, President; JANET FOSTER; SUSAN GLASBRENNER; MICHAEL SULLIVAN; DAVID RICHMAN; GREG SNIGOR; JAMES DI NAPOLI; WILLIAM ROSARIO; ABEL PELTRO; GEORGE F. BERGHORN; LISA ROSENZWEIG; and MICHAEL SMITH,

Plaintiffs-Appellants,

—against—

STATE OF NEW YORK; EDWARD V. REGAN, as Comptroller of the State of New York; ROBERT ABRAMS, as Attorney General of the State of New York; MATTHEW T. CROSSON, as Chief Administrator of the Unified Court System and THE STATE OF NEW YORK UNIFIED COURT SYSTEM,

Defendants-Appellees.

Before:

KAUFMAN, KEARSE, and PRATT,
Circuit Judges.

Plaintiffs appeal from a judgment of the United States District Court for the Southern District of New York, Robert P. Patterson, Jr., *Judge*, denying their motion for summary judgment and granting defendants'

summary judgment motion on the basis that the State of New York's lag-payroll law did not violate the contract clause of the United States Constitution. After hearing oral argument, we certified an unsettled question of state law to the New York Court of Appeals, 77 N.Y.2d 933, 572 N.E.2d 45, 569 N.Y.S.2d 604 (1991), which was answered in the negative. __ N.Y.2d __, __ N.E.2d __, __ N.Y.S.2d __ (1991). We now hold that the lag-payroll law violates the contract clause, so we reverse the judgment of the district court and remand with instructions to enter judgment for the plaintiffs.

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Nancy E. Hoffman, Albany, NY (Jerome Lefkowitz, Marilyn S. Dymond, Albany, NY, of counsel) *for amicus curiae Civil Service Employees Association, Inc.*

Vincent F. Pitts, New York, NY (Shea & Gould, Eve I. Klein, New York, NY, of counsel) *for amicus curiae New York State Court Clerks Association.*

Bernard F. Ashe, Albany, NY (Kevin H. Harren, Rocco A. Solimando, Albany, NY, of counsel) *for amicus curiae New York State United Teachers.*

Brian J. O'Donnell, Albany, NY (Rowley, Forrest, O'Donnell & Hite, P.C., Steven R. Kramer, Albany, NY, of counsel) *for amicus curiae New York State Inspection, Security, and Law Enforcement Employees District Council 82, AFSCME, AFL-CIO.*

PRATT, *Circuit Judge*:

Two of the chronic problems of modern government—a budget crunch and an overworked court system—intersect to create this contract-clause challenge to New York State's "lag payroll" law. The question before us is whether, in seeking to solve both problems through this lag-payroll scheme the state may constitu-

tionally finance an expansion of its court system by deferring the wages of certain court employees contrary to their collective bargaining agreements. Our answer is "no", because the lag-payroll legislation, as interpreted by the New York Court of Appeals, violates the contract clause of the federal constitution.

FACTS AND BACKGROUND

In December 1989 New York's judiciary made a budget request of $972.9 million for the fiscal year beginning April 1, 1990. This request was transmitted to the governor for inclusion in the state budget, pursuant to N.Y. Const. art. VII, § 1. The judiciary's budget request sought to create new judgeships and court positions in order to cope with "the exploding drug crisis" in the state, to increase the compensation of sitting judges, and to fund a number of collectively-bargained employee contracts.

At the same time, the state was facing a fiscal crisis. Instead of approving it outright, the legislature reduced the judiciary's budget request by $69.1 million, and refused to allow the requested judicial salary increases. Apparently recognizing a need for increased trial capacity and related staff, the legislature nevertheless approved the creation of the new judgeships and other court positions.

To help finance the new positions and to save $7 million, the legislature imposed a "lag payroll" on the non-judicial employees of the Unified Court System. That legislation, set forth in 1990 N.Y. Laws ch. 190, § 375(b), reads as follows:

(1) Notwithstanding the provisions of subdivision a of this section or of section 200 of the state finance law, commencing with the last bi-weekly payroll period ending at least fourteen days before March 31, 1991 for each nonjudicial officer or employee, the salary or wages of such officer or employee shall be payable by the state two weeks after they shall have become due. Until such time, an alternative procedure for payment of salaries and wages, to be determined by the comptroller, may be implemented in lieu of the procedure specified in subdivision 1 of such section 200 or in other provisions of law. The procedures set forth in this paragraph (including any alternative procedure determined by the comptroller) shall remain in effect until the state and an employee organization representing nonjudicial officers and employees who are in positions which are in collective negotiating units established pursuant to article 14 of the civil service law enter into an agreement providing otherwise for the payment of salaries and wages to such officers and employees.

(2) The provisions of paragraph 1 of this subdivision shall not apply to any alternative procedure for the payment of salaries and wages to nonjudicial officers and employees that was adopted pursuant to law and in effect immediately preceding the effective date of this subdivision.

The effect of this section is to delay payment of the affected employees' salaries until two weeks after those salaries are earned. Prior to implementation of § 375, the affected employees had been paid their bi-weekly salaries immediately after the two weeks were worked.

To phase in this two-week lag, the comptroller, as authorized by § 375, adopted an "alternative procedure" for paying salaries beginning November 7, 1990. Under that procedure, the affected employees were paid nine days' salary for the ten days worked in each pay period for ten two-week periods. Thus, for the fiscal year which ended March 31, 1991, affected employees were paid for 50 weeks' work instead of 52. The two weeks' pay thus withheld will be payable to the employees at the termination of their employment with the state at the rate of pay applicable to them at the time of termination.

This was not the first lag payroll imposed on judiciary employees. In 1982, during negotiations for the 1982-1985 contract period, the Unified Court System and the collective bargaining representatives for employees of the courts agreed to the establishment of a lag payroll provided a similar lag payroll was to be implemented for the majority of executive branch employees. A lag payroll was in fact implemented on most executive branch employees in 1982, and the judicial branch lag payroll commenced on November 18, 1982. This lag payroll was in effect until April 6, 1983, and applied only to those employees on the payroll during that period. Thus, § 375(b)(2) exempts from the current lag payroll those employees who had been subject to the previous negotiated one.

Each of the eleven individual plaintiffs is a court employee affected by the lag payroll, and each of the eleven plaintiff labor organizations is a party to a three-year collective bargaining agreement with New York's Unified Court System. Although the terminology varies

slightly among some of the agreements, each essentially contains the following article:

> SALARY COMPUTATION
>
> Bi-weekly salaries will be computed on the basis of 10 working days.

In addition, N.Y. State Finance Law § 200(1) provides: "The salaries of all officers of the state and the wages of all employees thereof shall be due from and payable by the state bi-weekly." This provision was expressly superseded by the lag payroll legislation for the pertinent time period.

Plaintiffs filed this action in the Southern District of New York, asserting three federal constitutional violations. They claimed (1) that the lag-payroll legislation violated the contract clause, (2) that it constituted a deprivation of property without due process of law, and (3) that it violated the equal protection clause of the fourteenth amendment. The plaintiffs sought a declaration that the lag-payroll legislation was unconstitutional, an injunction prohibiting defendants from implementing the lag payroll, and damages in the form of restitution of any salary withheld under the system.

In an opinion reported at 749 F. Supp. 97 (S.D.N.Y. 1990), Judge Patterson granted summary judgment for the defendants. He reasoned, first, that there was no contractual impairment at all, because each collective bargaining agreement contained the following provision, as mandated by N.Y. Civ. Serv. Law § 204-a(1):

> It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds there-

> for, shall not become effective until the appropriate legislative body has given approval.

Judge Patterson interpreted this provision as contemplating a separate legislative appropriation in each fiscal year in order to implement the compensation provisions of the three-year collective bargaining agreements. 749 F. Supp. at 100-01.

Secondly, Judge Patterson held that, should his interpretation of § 204-a(1) be incorrect, any impairment of contractual rights was reasonable and necessary to further an important public purpose under the test enunciated in *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 25 (1977). 749 F. Supp. at 101. Judge Patterson granted summary judgment on the plaintiffs' due process and equal protection claims as well. 749 F. Supp. at 101-02.

On appeal, the plaintiffs renew only their contract-clause challenge to the lag-payroll legislation, claiming (1) that the district court erred in its interpretation of § 204-a(1) and (2) that the legislation violated the contract clause.

DISCUSSION

A. *Civil Service Law § 204-a(1)*

The district court rested its holding on its construction of N.Y. Civ. Serv. Law § 204-a(1). Noting that the district court's decision on § 204-a(1) conflicted with the decision of the New York Supreme Court, Albany County, in *Matter of Quirk v. Regan*, 148 Misc.2d 300, 565 N.Y.S.2d 422 (N.Y. Sup. Ct., Albany Cty. 1991),

we certified the statutory issue to the New York Court of Appeals with the following question:

> Does N.Y. Civ. Serv. Law § 204-a(1) make the compensation sections of collective bargaining agreements to which it applies conditional upon or subject to annual legislative appropriations?

On June 27, 1991, the New York Court of Appeals answered this question in the negative. *See* __ N.Y.2d __, __ N.E.2d __, __ N.Y.S.2d __ (1991).

The New York Court of Appeals determined, contrary to the conclusion of the district court, that § 204-a(1) "does not make the compensation sections of the collective bargaining agreements before us conditional upon or subject to annual legislative appropriations." *Association of Surrogates*, __ N.Y.2d at __, __ N.E.2d at __, __ N.Y.S.2d at __. Reasoning that the district court's interpretation of § 204-a(1) conflicted with the Taylor Law's twin goals of protecting collective bargaining rights and encouraging multi-year contracts, the New York Court of Appeals unanimously decided that the contracts became valid when ratified. *Id.*, __ N.Y.2d at __, __ N.E.2d at __, __ N.Y.S.2d at __. Thus, the district court's holding that there was no contractual impairment was erroneous as a matter of New York law. The only matter remaining for our determination is whether the district court's alternative holding—"that the impairment was a reasonable and necessary one"—was correct.

B. *Contract Clause*

Article I, § 10, clause 1 of the United States Constitution reads, in pertinent part:

> No state shall * * * pass any * * * Law impairing the Obligation of Contracts * * *.

This clause is "one of the few 'rights-protecting' provisions in the original Constitution", G. Stone, L. Seidman, C. Sunstein & M. Tushnet, *Constitutional Law* 1428 (1986), and has been called by one legal historian "the bulwark of American individualism against democratic impatience and socialistic fantasy." H. Maine, *Popular Government* 247-48 (1885).

Despite the seemingly absolute language of the contract clause, finding an "impairment" of contract is merely a threshold step toward "resolving the more difficult question whether that impairment is permitted under the Constitution." *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 21 (1977). This "more difficult question" is resolved by balancing the contractual rights of the individual against "the 'essential attributes of sovereign power' necessarily reserved by the States to safeguard the welfare of their citizens." *Id.* (quoting *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934)) (citation omitted). Once "impairment" is found, there are two further steps to our inquiry. First, we must determine whether the legislation operates to "substantially" impair contractual obligations. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). Then, should the impairment be more than a "minimal" one, we must move on "to a careful examination of the nature and purpose of the state legislation." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (1978).

Generally, legislation which impairs the obligations of *private* contracts is tested under the contract clause by

reference to a rational-basis test; that is, whether the legislation is a "reasonable" means to a "legitimate public purpose". *United States Trust Co.*, 431 U.S. at 22-23. "As is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* (citing *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945)).

But courts are not so deferential when the state's legislation is self-serving and impairs the obligations of *its own* contracts. In this situation, a more searching analysis under the contract clause is appropriate:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake. A governmental entity can always find a use for extra money, especially when taxes do not have to be raised. If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.

United States Trust Co., 431 U.S. at 25-26 (footnotes omitted).

1. *"Substantial" impairment?*

Initially, the defendants argue that the contractual impairment at issue is "minimal at best", and therefore does not rise to the level of a "substantial" impairment meriting contract-clause analysis. Citing *Spannaus*, 438 U.S. at 245, the defendants argue that since the impairment is "minimal", we "may end the [contract-clause] inquiry at its first stage." *Id.* We disagree.

The Supreme Court has noted that "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear." *Id. See also Castellano v. Board of Trustees*, No. 90-7950, slip op. 5653, 5664 (2d Cir. June 25, 1991). However, the Court in *Spannaus* went on to define the "severity" of a contractual impairment:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Spannaus, 438 U.S. at 245.

Guided by *Spannaus*, we cannot agree that the contractual impairment created by the lag payroll was "minimal". The lag payroll has the effect of withholding ten percent of each employee's expected wages over a period of twenty weeks and postponing their payment indefinitely. For instance, a 25-year-old employee would not be repaid her lagged wages until she leaves the

state's employ—perhaps 45 years, should she devote her entire career to governmental service. The affected employees have surely relied on full paychecks to pay for such essentials as food and housing. Many have undoubtedly committed themselves to personal long-term obligations such as mortgages, credit cards, car payments, and the like—obligations which might go unpaid in the months that the lag payroll has its immediate impact. *Cf. Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 342 n.9 (1969) (" 'For a poor man * * * to lose part of his salary often means his family will go without the essentials. * * * .' ") (quoting statement of Congressman Gonzales, 114 Cong. Rec. 1833). Indeed, it would be inconsistent for us to accept the defendants' argument that this impairment was necessary because of a governmental fiscal crisis, and to do so by disregarding the personal fiscal crises that the lag payroll would create.

Furthermore, the defendants' argument is severely undercut by the presence of a specific, separately-enumerated term in each of the collective bargaining agreements which requires that bi-weekly salaries be paid on the basis of ten working days. This term cannot be dismissed as "minimal" in light of the state's past history of imposing lag payrolls only by agreement, *see Association of Surrogates*, __ N.Y.2d at __, __ N.E.2d at __, __ N.Y.S.2d at __ (lag payrolls imposed, by negotiated agreement, on executive branch and court system employees during 1982 and 1983). We conclude, therefore, that the impairment of the state's contractual obligations was substantial.

2. *Reasonable and necessary to serve an important public purpose*?

Since we have determined that the impairment is substantial and not "minimal", it can survive scrutiny only if it is "reasonable and necessary to serve an important public purpose." *United States Trust Co.*, 431 U.S. at 25. The defendants' position in this regard is neatly summed up in this paragraph from defendant Crosson's brief:

> Instead of enacting the lag payroll legislation, the Legislature could have sought to save $7.0 million by disapproving the filling of any of the new positions or judgeships requested by the Judiciary—in short, by cutting court programs. However, the Legislature was well aware that reducing court resources would only further exacerbate the crisis in the courts, and so it chose a method that would save money within the State's fiscal constraints without making program reductions—it would defer a small percentage of employee salaries. Clearly, this temporary, prospective enactment served the important purpose of providing necessary funding to enable the Judiciary to fulfill its mission, and it was an appropriate, reasonable and necessary means of achieving this end.

See also affidavit of Matthew T. Crosson ¶ 6, at 5-6 ("The Legislature elected to maintain, and slightly expand, those court positions and operations deemed vital to the system, and toward this end the lag payroll legislation was enacted.").

Crosson's affidavit and brief, we believe, give us sufficient reason to reverse the district court's determina-

tion. Assuming, for the sake of argument only, that the maintenance and expansion of the New York court system constitutes an "important public purpose", the means chosen by the state are, quite obviously, in no way "necessary" to the achievement of the stated goals.

It cannot be said that a lag payroll for only judicial employees was essential in order to finance the expansion of the court system. The state could have shifted the seven million dollars from another governmental program, or it could have raised taxes. We recognize that neither alternative would have been popular among politician-legislators, but that is precisely the reason that the contract clause exists—as a "constitutional check on state legislation". *Spannaus*, 438 U.S. at 241. In fact, the lag-payroll scheme smacks of the political expediency that *United States Trust Co.* warned of: "A governmental entity can always find a use for extra money, especially when taxes do not have to be raised." 431 U.S. at 26. Clearly, the New York legislators and its governor would prefer not to raise the taxes of their constituents; by placing the costs of improvements to the court system on the few shoulders of judiciary employees instead of the many shoulders of the citizens of the state, they ruffle only a few feathers and fight the "exploding drug crisis" without raising taxes or cutting other governmental programs. But the only people paying for the new courts are the few employees of the judicial branch who are subjected to the lag payroll. The contract clause bars such expedient *post hoc* changes in contractual obligations, for "a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives." *United States Trust Co.*, 431 U.S. at 30-31.

The defendants view the lag payroll as a financial device that the legislature may properly employ, and they praise the district court for not acting as a "super-legislature" or "attempt[ing] to second-guess which legislative action would have better solved the perceived problems" caused by the budget crunch. But if the federal judiciary's proper role were as supine as defendants assert it to be, the contract clause would be a "dead letter", contrary to the instruction of *Spannaus* that "the Contract Clause remains part of the Constitution." *Spannaus*, 438 U.S. at 241.

In sum, on April 1, 1988, the State of New York promised the affected judicial employees, *inter alia*, that they would be paid bi-weekly, "on the basis of ten workdays." For 20 weeks from November 1990 through February 1991 the State of New York paid these employees on the basis of only nine workdays, and used the resulting savings to finance an expansion of its court system. But the contract clause, which "limits * * * the power of a State to abridge existing contractual relationships", *Spannaus*, 438 U.S. at 242, is especially vigilant when a state takes liberties with its own obligations. *See Energy Reserves Group*, 459 U.S. at 412 n.14 ("When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets."). The contract clause, if it is to mean anything, must prohibit New York from dishonoring its existing contractual obligations when other policy alternatives are available. This principle has been with us almost as long as our constitutional law:

> But when the legislature makes a contract with a public officer, as in the case of a stipulated salary for his services, during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens.

Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 694 (1819) (Story, J., concurring). Were we to uphold this lag-payroll legislation, one wonders if the employees would ever receive their lagged wages, or whether another of the state's perennial "fiscal crises", *cf. Matter of Subway-Surface Supervisors v. New York City Transit Authority*, 44 N.Y.2d 101, 110, 375 N.E.2d 384, 389, 404 N.Y.S.2d 323, 328 (1978), would justify deferring again, or even cancelling, the lagged wages when they eventually become due. If a state government could so cavalierly disregard the obligations of its own contracts, of what value would its promises ever be?

C. *Mootness and Eleventh Amendment Bar*

Finally, appellees State of New York, Regan, and Abrams challenge, by supplemental brief, our jurisdiction over this case. They argue that (1) the lag payroll having been fully effectuated as of March 13, 1991, the claim for declaratory and injunctive relief is moot; and (2) since this mootness would limit the plaintiffs' remedy to "retroactive monetary relief", the monetary claim is barred by the eleventh amendment. We reject both arguments.

First, the claim for declaratory and injunctive relief is not moot. Although a total of two weeks' salary has already been withheld from the affected employees, the

lag payroll continues, and will continue, to impair the state's contractual obligations by deferring every salary check of each employee for a period of two weeks, until the employee leaves the service of the state. At the time the collective bargaining agreements were ratified, N.Y. State Finance Law § 200(1) mandated that state employees' wages "be due from and payable by the state biweekly". It is hornbook law that this statute was part of each collective bargaining agreement, since "existing laws [are] read into contracts in order to fix obligations as between the parties". *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. at 435. Thus, the lag-payroll law expressly impaired this obligation of immediate payment contained in the collective bargaining agreements. As we have stated above, such an impairment is not "reasonable and necessary" to further any important public purpose, *United States Trust Co.*, 431 U.S. at 25, and will, therefore, be enjoined.

Moreover, since we direct the district court to enjoin the lag-payroll law (a purely prospective remedy), the state defendants, "in order to shape their official conduct to the mandate of the [c]ourt's decrees," will have to restore the withheld monies to the affected employees. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). "Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*, [209 U.S. 123 (1908)]." *Edelman*, 415 U.S. at 668. Since the eleventh amendment does not bar suits against state officers to enjoin violations of federal law, and any monies that will be restored to the plaintiffs from the state treasury are ancillary to the prospective relief which we order, defendants' jurisdictional arguments are meritless.

CONCLUSION

The State of New York's lag-payroll law violates the contract clause, U.S. Const. art. I, § 10. The judgment of the district court is reversed, and the case is remanded with instructions to (1) enter a declaratory judgment declaring that New York's lag-payroll law violates the contract clause of the United States Constitution; (2) enjoin the continuing effects and application of the lag-payroll law; and (3) enter an appropriate judgment for the plaintiffs which shall include restitution of the lagged wages for all affected employees. Whether or not interest shall be awarded on the restored wages will lie in the equitable discretion of the district court.

STATE OF NEW YORK
COURT OF APPEALS

No. 157

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK, et al.,

Plaintiffs,

—v.—

STATE OF NEW YORK, et al.,

Defendants.

DAVID SCHLACHTER, *for plaintiffs.*

KENNETH FALK, *for defendant Office of Court Administration.*

New York State AFL-CIO; New York State United Teachers; The Civil Service Employees Association, Inc.; New York State Court Clerks Association; and District Council 82, AFSCME, AFL-CIO, *amici curiae.*

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

PER CURIAM:

This appeal—here on a question of statutory interpretation certified to us by the United States Court of Appeals for the Second Circuit—requires us to determine whether Civil Service Law § 204-a(1) makes "the compensation sections of collective bargaining agreements to which it applies conditional

upon or subject to annual legislative appropriations." For the reasons that follow, we answer that question in the negative.

I.

This action was brought in the United States District Court for the Southern District of New York as a constitutional challenge to legislation enacted by the State of New York (L 1990, ch 190, § 375), which provided that, as of March 1991, the salaries of nonjudicial officers and employees of the New York State Unified Court System hired on or after April 7, 1983 would be payable by the State two weeks after they became due. (Court employees hired before April 7, 1983 and other State employees were already subject to a two-week delay.)

The State Comptroller implemented the legislative direction by a "lag payroll": commencing November 7, 1990, affected employees were paid nine rather than 10 days' salary in each two-week pay period, for 10 periods. As a result, during the 1990-1991 fiscal year ending March 31, 1991, employees were paid for 50 rather than 52 weeks of work. Withheld amounts were to be repaid upon termination of employment at the employees' then rate of salary.

Plaintiffs are 11 labor organizations representing nonjudicial employees and 11 individual employees of the court system. Each of the labor organizations was a party to a collective bargaining agreement with the Unified Court System for the three-year period from April 1, 1988 to March 31, 1991. Each agreement provided that "Bi-weekly salaries will be computed on the basis of 10 working days."

Plaintiffs contend that the lag payroll violates the provision of their contracts that salaries will be computed on the basis of ten working days; that the legislation authorizing the lag payroll is an unconstitutional impairment of their contracts (US Const, art I, § 10); and that the law transgresses their Equal Protection and Due Process rights (US Const, XIV amdmt).

The District Court granted summary judgment for the State (749 F Supp 97). It concluded that the collective bargaining agreements were not impaired because each agreement contained the following clause, as required by Civil Service Law § 204-a(1):

> It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate legislative body has given approval.

The District Court read this clause to mean that the compensation sections of the collective bargaining agreements were provisions "requiring legislative action to permit [their] implementation * * * by providing the additional funds therefor," and as a result that the compensation sections took effect only when the Legislature appropriated money for that purpose. The Court rejected plaintiffs' argument that the Legislature had given the requisite "approval" by ratifying the agreements, concluding that since the Legislature's appropriation for the court system for fiscal year 1990-91 contemplated the lag payroll, there was no contractual impairment. Alternatively, the Court held that any impairment was "reasonable and necessary" because of the State's budget crisis, and that there was no Due Process or Equal Protection violation.

After argument of plaintiffs' appeal, the Second Circuit, noting the District Court's decision and the decision of Supreme Court, Albany County holding the lag payroll unconstitutional (*Matter of Quirk v Regan*, 148 Misc 2d 300), certified that a novel question of state law was presented, with serious implications for the State's obligations with respect to its public employment contracts. The Court therefore asked us to decide the unsettled threshold question of New York statutory law: whether section 204-a(1) makes "the compensation sections of collective bargaining agreements to which it applies conditional upon or subject to annual legislative appropriations." No constitutional issue is presented.

On April 4, 1991, we accepted the certified question for review (____ NY2d ____).

II.

Section 204-a(1) is part of article 14 of the Civil Service Law—the Public Employees' Fair Employment Act, also known as the Taylor Law. Section 204-a(1) provides that written agreements between public employers and employee organizations determining the terms and conditions of employment must contain—as did the contracts in this case—notice that any provision requiring "legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate legislative body has given approval."

Accepting the State's arguments, the District Court held that the legislative history of the clause meant that it was "susceptible of but one meaning—that legislative appropriations are necessary before compensation or salary provisions of collective bargaining agreements become effective." This reading finds its best support in the statutory reference to provisions "requiring legislative action to permit [their] implementation * * * by providing the additional funds therefor." As with any other expenditure of funds by the State, money for public employees' salaries must be appropriated by the Legislature each year (NY Const, art VII, § 7; *Anderson v Regan*, 53 NY2d 356, 359). One possible interpretation of the statute, therefore, is that each year's compensation provisions require "additional funds," and are not effective until the Legislature gives its approval by appropriating money for that purpose.

That, however, is not the only possible reading of the statute. In our view, the construction advanced by plaintiffs is equally plausible.

Plaintiffs do not dispute the necessity for a legislative appropriation before State funds may be paid as salary to public employees. What they do dispute is an interpretation of the statute that equates legislative "approval" with annual

appropriations. In plaintiffs' view, the statute requires only one legislative "approval": ratification of the collective bargaining agreement by the Legislature. Once that approval is given, the contract binds the State. Nothing in the statute, plaintiffs contend, requires that approval be given more than once or permits the State to evade its obligations by simply failing to appropriate the necessary funds.

The disagreement between the parties thus centers on the meaning of "approval" in section 204-a(1). The State defendants urge that "approval" is not a one-step process, that initial approval of a contract does not end the Legislature's role, and that each year's appropriation of funds is a separate "approval" of the compensation provisions of collective bargaining agreements. In contrast, plaintiffs argue that the Legislature's ratification of the three-year agreements constituted the only "approval" required by the statute. While the State's interpretation is consistent with the statutory reference to "legislative action to permit its implementation * * * by providing the additional funds therefore," plaintiffs' interpretation is supported by the fact that the statute refers only to legislative approval, not to multiple approvals during the life of a contract.

Given the plausibility of each interpretation, we reject both parties' contentions that the plain language of the statute compels one construction over the other, and turn to other sources for guidance in applying Civil Service Law § 204-a(1) to the facts before us. We begin with the legislative history of section 204-a(1).

III.

Section 204-a(1) was enacted in 1969, two years after the Taylor Law, as one of a number of amendments to that law.

The District Court rested its reading of section 204-a(1) on a memorandum of the Senate Rules Committee stating that a purpose of the amendments was to "obviate confusion as to the effect of an agreement between an employer and employee organization by making clear (through a change in

the definition of 'agreement' and by requiring notice to all employees) that legislative action is needed before the agreement becomes effective as to those provisions requiring legislative approval such as, for example, the appropriation of funds for salaries" (1969 McKinney's Session Laws of NY, at 2365). From this statement the District Court concluded that section 204-a(1) meant that "legislative appropriations are necessary before compensation or salary provisions of collective bargaining agreements become effective."

The quoted statement of legislative purposes establishes that the objective of the amendment creating section 204-a(1) was to make explicit the requirement of legislative approval of certain types of provisions—in particular, those requiring the appropriation of funds—contained in collective bargaining agreements. That statement does not, however, answer the question posed by this case—whether the requisite "approval" consists of the Legislature's initial ratification of a three-year collective bargaining agreement, or the annual appropriations of the necessary funds. We cannot agree, therefore, that this legislative history in any way settles the question before us.

Like the District Court, we find no additional guidance in the balance of the legislative history of section 204-a(1). It is clear from documents contained in the Bill Jacket relating to the 1969 amendments that controversy focused on proposals relating to fines and the forfeiture of membership dues. The amendment with which we are concerned received scant attention. Indeed, neither the Interim Report of the Governor's Committee on Public Employee Relations (dated June 17, 1968), nor its second report (dated January 23, 1969) containing specific suggestions for amendments to the Taylor Law, even mentions the amendment codified as section 204-a(1). The 1969 Report of the Select Joint Legislative Committee on Public Employee Relations, which was prepared subsequent to the passage of the 1969 amendments, confirms that the purpose of the amendment was to "preserve to the legislative body its independence in approving commitments made by the chief executive officer in negotiations," but is silent as to the meaning of "approval."

Thus, the only conclusion we can draw from the legislative history of section 204-a(1) is that it sheds no light on the question before us.

IV.

"[A] primary command to the judiciary in the interpretation of statutes is to ascertain and effectuate the purpose of the Legislature," and in "finding such purpose, one should look at the entire statute, its legislative history and the statutes of which it is made a part" (*Rankin v Shanker*, 23 NY2d 111, 114). These elemental principles of statutory interpretation focus our attention on the Taylor Law and its history.

The Taylor Law, effective September 1, 1967, was the consequence of recommendations put forward by the Governor's Committee on Public Employee Relations, headed by Professor George W. Taylor. In approving the legislation, the Governor noted that he had been prompted to appoint the committee because the need for a change in the law had been "unquestionably demonstrated over the years by the utter inadequacy of the Condon-Wadlin law to resolve paralyzing strikes and threats of strikes by public employees" (1967 McKinney's Session Laws of NY, at 1527).

The Condon-Wadlin Act (former Civil Service Law § 108) prohibited strikes in public employment and provided severe penalties for public employees who did strike. Perhaps because of its harshness, the Act failed in its purpose (Staff Report to the Joint Legislative Committee on Industrial and Labor Conditions, 2 [Aug. 1962], quoted in Ruffo, *The Residue of Sovereignty in New York Public Employment*, 39 Alb L Rev 165, 177 n. 71). "Public employees violated that law freely, since they knew that the public did not want these penalties administered and that public officials were reluctant to administer them." (Note, *Good Faith Bargaining Under the Taylor Law*, 39 Bklyn L Rev 658, 660 [1973]). It was "common knowledge that the 'automatic' penalty provisions of Condon-Wadlin have never been enforced (with but two exceptions) over an almost 20-year period, in which the

strikes by public employees have been too numerous to recall or record" (*Matter of Di Maggio v Brown*, 19 NY2d 283, 289).

Against this background, on January 15, 1966, the Taylor Committee was established by Governor Rockefeller. The Governor requested that the Committee "make legislative proposals for protecting the public against the disruption of vital public services by illegal strikes, while at the same time protecting the rights of public employees." (Governor's Committee on Public Employee Relations, Final Report ["Taylor Committee Report"], March 31, 1966, at 9).

The Taylor Committee found that there were sound reasons for continuing the prohibition against strikes by public employees, noting that instead of "the constraints of the market place on collective bargaining, including the right to strike, which are in the private sector, negotiations in the public sector are subject to the constraints imposed by democratic political processes." As a result, while a "work stoppage in the private sector involves costs primarily to the direct participants," "a strike of government employees * * * introduces an alien force in the legislative processes." (Taylor Committee Report, *supra* at 15). Therefore, while recommending repeal of the Condon-Wadlin Act, the Taylor Committee also advised that the statutory prohibition against public employee strikes be continued (Taylor Committee Report, *supra* at 6, 8, 18).

At the same time, however, the Taylor Committee concluded that it "is elementary justice to assure public employees, who are estopped from using the strike, that they have the right to negotiate collectively." (Taylor Committee Report, *supra* at 20). The Committee found that public employee strikes "have often been caused by a feeling of futility on the part of public employees because of the absence of other means by which they could participate in the determination of the terms and conditions of their employment," and that in "some instances their inability to form or join organizations which are assured of standing as recognized representatives has contributed to this sense of futility and has led them into strike action." (Taylor Committee

Report, *supra* at 42). To solve this problem, the Committee recommended that public employees be permitted to organize and negotiate with public employers.

As enacted, therefore, the Taylor Law had two purposes: "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." (Civil Service Law, § 200.) In approving the legislation the Governor confirmed that the purpose of the law was both to secure fair treatment for public employees and to protect the public, stating that the legislation "ushers in a new age of public employee relations in New York State" and that it "proclaims the rights of government employees, yet recognizes the special obligations borne by those who provide the vital services of government." (1967 McKinney's Session Laws of NY, at 1527.)

Present practice under the Taylor Law overwhelmingly favors multi-year collective bargaining agreements. Nearly all of the contracts on file with the Public Employment Relations Board for the period 1988-1991 were multi-year contracts. That multi-year contracts further the purposes of the Taylor Law by avoiding the unrest of perpetual labor negotiations, and by allowing parties to balance out their demands and concessions over longer periods of time, is manifest.

While the Taylor Law does not require multi-year agreements, it explicitly contemplates them (*see, e.g.*, Civil Service Law §§ 201[12], 208[2][b], 209[4][c][vi]). Significantly, public employers are forbidden to refuse to continue the terms of an expired agreement while a new one is being negotiated (Civil Service Law § 209-a[1][e]).

In interpretating provisions of the Taylor Law—including section 204-a(1)—we of course must give weight to its statutory purposes, and to the provisions that express a policy in favor of multi-year collective bargaining agreements. Of the two possible readings of section 204-a(1), only plaintiffs' construction furthers those purposes.

As defendants would interpret section 204-a(1), the Legislature decides anew each year whether to approve—or to

disapprove—the compensation provisions of multi-year collective bargaining agreements when it appropriates funds for that purpose. While "compenstation" is principally regarded as salary, it has also been held that "compensation" under particular contracts included insurance (*Matter of Town of Haverstraw v Newman*, 75 AD2d 874), pensions, vacations and military leave (*Matter of Teachers Association v Board of Education*, 34 AD2d 351, 353), even uniform allowances (*Auburn v Auburn Firefighters*, 6 PERB 4512). Moreover, other contract terms may also require expenditure of funds by the public employer. Under defendants' interpretation, therefore, not only salary terms but all contract provisions requiring an expenditure of additional funds by a public employer would be at risk of annual revision through the appropriations process.

Defendants do not suggest that plaintiff labor organizations have any power corresponding to the Legislature's unilateral power to modify the provisions of multi-year collective bargaining agreements that require expenditures, or that they have any recourse when the Legislature chooses to exercise that power—though plaintiffs are prohibited from striking (Civil Service Law § 210[1]). Thus, under defendants' view, the provisions of multi-year collective bargaining agreements are one-sided: they are binding on labor organizations for their full terms, but subject to annual revision by the Legislature.

This imbalance conflicts with the Taylor Law policy in favor of collective bargaining agreements for periods longer than one year. Defendants deny that their interpretation will have any effect on the extent to which labor organizations are willing to enter into multi-year collective bargaining agreements, and suggest that "the negotiation of single or multi-year agreements in the future will be a function of the parties' respective confidence in, and the predictability of, the condition of the State's economy." While the State's economic health is undoubtedly relevant to such negotiations, we are unable to accept the contention that labor organizations will be undeterred from entering multi-year collective bargaining agreements with public employers if we adopt defen-

dants' interpretation of section 204-a(1). As plaintiffs and the *amici* urge, employees would not likely agree to be bound for several years by compensation provisions of a collective bargaining agreement that did not also bind the employer.

We thus conclude that defendants' interpretation of section 204-a(1) is inconsistent with the language and purposes of the Taylor Law.

V.

A legislative construction of a statute may be implied from legislative action (McKinney's Cons Laws of NY, Book 1, Statutes § 75[a]). "A uniform course of action involving the right to the exercise of an important power by the State government without question is no unsatisfactory evidence that the power is rightfully exercised" (*Matter of Koenig v Flynn*, 258 NY 292, 300, *aff'd* 285 US 375). Here, the converse is true: the legislation ratifying the collective bargaining agreements at issue here, and the Legislature's past practice in such matters, demonstrate that the Legislature has never regarded itself as having the power to approve separately each year of an approved multi-year collective bargaining agreement.

The 1988-1991 contracts of most of the labor organization plaintiffs were ratified effective April 1, 1988 (L 1988, ch 787).[1] The language used in ratifying these agreements supports plaintiffs' reading of the statute over the State's.

The ratification statute begins with the declaration that the "purpose of this act is to *implement these agreements*" (L 1988, ch 787, § 1) (emphasis supplied). No limitation is expressed; the language used is keyed precisely to section 204-a(1). Moreover, the ratification statute explicitly approves the pay increases scheduled for each year of the three-year agreement (see, L 1988, ch 787, § 8[b], [c], [d]), thus supporting plaintiffs' contention that by ratifying the agreements the

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1 L 1988, ch 787 did not ratify agreements with all the labor organizations that are plaintiffs here, but no contention is made that that act is materially different from legislation ratifying agreements with the other plaintiffs.

Legislature gave "approval" within the meaning of section 204-a(1) to the entire three-year obligation expressed in the contract, not simply to its first year.

Apart from the statute ratifying the agreements here, the Legislature's past practice with regard to multi-year collective bargaining agreements has been consistent with plaintiffs' position. Plaintiffs contend—and defendants do not deny—that the Legislature's practice has been to ratify such agreements once and thereafter to appropriate the necessary money.[2] The Legislature has not previously asserted any separate right to disapprove the compensation sections of multi-year collective bargaining agreements. Neither the lag payroll legislation nor the Governor's memorandum of approval suggested that the Legislature was exercising a right under section 204-a(1) to withhold approval of previously ratified collective bargaining agreements (L 1990, ch 190, § 375; 1990 McKinney's Session Laws of NY, at 2707).

Another relevant aspect of past practice is that, so far as the record discloses, the State has never before unilaterally imposed a lag payroll on its employees. While lag payrolls were imposed on Executive Branch and Court System employees during 1982-1983, in both instances that was done pursuant to negotiated agreement.

In short, a review of the Legislature's ratification of the collective bargaining agreements here and its past practice reveal a consistent course of action supporting plaintiffs' interpretation of section 204-a(1) over the State's.

VI.

Thus, we conclude that Civil Service Law § 204-a(1) does not make the compensation sections of the collective bargaining agreements before us conditional upon or subject to annual legislative appropriations. We reach this conclusion

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2 Appendix B to the brief submitted by *amicus* New York State Inspection, Security and Law Enforcement Employees, DC 82, AFSCME, demonstrates that this has been the Legislature's practice with regard to the collective bargaining agreements between that union and the court system.

from the language of 204-a(1), considered in the light of legislative history and past practice.

Accordingly, the certified question should be answered in the negative.

* * *

Following certification of a question by the United States Court of Appeals for the Second Circuit and acceptance of the question by this Court pursuant to section 500.17 of the Rules of Practice of the New York State Court of Appeals, and after hearing argument by counsel for the parties and consideration of the briefs and the record submitted, certified question answered in the negative. Opinion Per Curiam. Judges Simons, Kaye, Alexander, Titone, Hancock and Bellacosa concur. Chief Judge Wachtler took no part.

Decided June 27, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 Civ. 6522 (RPP)

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK, MARY O'LEARY, PRESIDENT; CITYWIDE ASSOCIATION OF LAW ASSISTANTS, BARBARA BROWN, PRESIDENT; COURT ATTORNEYS ASSOCIATION OF THE CITY OF NEW YORK, ROBERT A. MULHALL, PRESIDENT; COURT OFFICERS BENEVOLENT ASSOCIATION OF NASSAU CO., JEFFREY POLLACK, PRESIDENT; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES & LOCAL 1070, PAUL SHELKIN, PRESIDENT; LOCAL 704, SERVICE EMPLOYEES INTERNATIONAL UNION, JOHN WALSH, PRESIDENT; NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION, ILA, LOCAL 2013, AFL-CIO, JOHN MCKILLOP, PRESIDENT; NINTH JUDICIAL DISTRICT COURT EMPLOYEES ASSOCIATION, MARTIN SHARP, PRESIDENT; SUFFOLK CO. COURT EMPLOYEES ASSOCIATION, INC., THOMAS F. MCGUINNESS, PRESIDENT; THE COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1180, ARTHUR CHELIOTES, PRESIDENT; CIVIL SERVICE FORUM, LOCAL 300, SEIU, SALVATORE CANGIARELLA, PRESIDENT; JANET FOSTER, SUSAN GLASBRENNER, MICHAEL SULLIVAN, DAVID RICHMAN, GREG SNIGOR, JAMES DINAPOLI, WILLIAM ROSARIO, ABEL PELTRO, GEORGE F. BERGHORN, LISA ROSENZWEIG and MICHAEL SMITH,

Plaintiffs,

—against—

STATE OF NEW YORK; EDWARD V. REGAN, as Comptroller of the State of New York; ROBERT ABRAMS, as Attorney General of the State of New York; MATTHEW T. CROS-

SON, as Chief Administrator of the Unified Court System and the State of New York Unified Court System,

Defendants.

APPEARANCES

Attorneys for Plaintiff:

Schlachter & Mauro
353 Veterans Memorial Highway
Commack, New York 11725
By: David Schlachter, Esq.

Attorneys for Defendant:

Michael Colodner
270 Broadway, Room 1400
New York, New York 10007
By: Patricia P. Satterfield, Esq.

OPINION AND ORDER

ROBERT P. PATTERSON, JR., *U.S.D.J.*

This is a declaratory judgment action seeking to declare unconstitutional Section 375 of Chapter 190 of the Laws of New York of 1990 which establishes a lag payroll for nonjudicial employees of the Unified Court System hired on or after April 7, 1983. Plaintiffs by order to show cause moved for a preliminary injunction pursuant to Fed. R. Civ. P. 65 enjoining defendants from implementing the law on November 7, 1990 and directing that they continue to pay plaintiffs in the same manner as currently. On the return date the parties agreed that there were no issues of fact and that the

Court could also treat this as a motion and cross-motion for summary judgment. For the reasons set forth below, plaintiffs' motions are denied and defendants' motion for summary judgment is granted.

BACKGROUND

Section 375 of Chapter 190 provides:

> b. (1) Notwithstanding the provisions of subdivision a of this section or of section 200 of the state finance law, commencing with the last bi-weekly payroll period ending at least fourteen days before March 31, 1991 for each nonjudicial officer or employee, the salary or wages of such officer or employee shall be payable by the state two weeks after they shall have become due. Until such time, an alternative procedure for payment of the salaries and wages, to be determined by the comptroller, may be implemented in lieu of the procedure specified in subdivision 1 of such section 200 or in other provisions of law. The procedures set forth in this paragraph (including any alternative procedure determined by the comptroller) shall remain in effect until the state and an employee organization representing nonjudicial officers and employees who are in positions which are in collective negotiating units established pursuant to article 14 of the civil service law enter into an agreement providing otherwise for the payment of salaries and wages to such officers and employees.
>
> (2) The provisions of paragraph 1 of this subdivision shall not apply to any alternative procedure for the payment of salaries and wages to nonjudicial officers and employees that was adopted pursuant to law and in effect immediately preceding the effective date of this subdivision.

Act approved May 25, 1990, ch. 190, 1990 N.Y. Laws 375.

On June 18, 1990, the state comptroller determined in order to implement Section 375 that, commencing November

7, 1990, affected employees will be paid nine-days' salary rather than ten-days' salary in each pay period for ten two-week pay periods. *See* Crosson Aff., Exh. C. Thus during the 1990-91 fiscal year ending March 31, 1991, employees will be paid for 50 rather than 52 weeks of employment. The two weeks' pay withheld would be repaid to the affected employees upon termination of their employment at the rate applicable to them at that time. This so-called lag payroll system under present state parlance has been applicable to state employees other than those in the Unified Court System for several years.

Each of the eleven plaintiff labor organizations is party to a collective bargaining agreement with the State of New York Unified Court System which extends for a three-year period and which establishes compensation for nonjudicial employees. Employees hired on or after April 7, 1983 are currently paid every second Wednesday for the two-week period which ends on the date of payment. Plaintiffs claim that imposition of a lag payroll system under Section 375 of Chapter 190 violates the Contract Clause, Article I, Section 10, clause 3 and the Equal Protection and Due Process clauses of the Fourteenth Amendment of the United States Constitution.

DISCUSSION

In this Circuit, a party seeking preliminary injunctive relief must show:

> (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979). Because plaintiffs in this action have failed to demonstrate either a likelihood of success on the merits or serious questions as to the merits combined with a balance of

hardships in their favor, their motion for a preliminary injunction is denied.

Summary judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). Because the matter presented does not raise any issues of fact, the Court denies plaintiffs' motion for summary judgment and grants summary judgment in favor of defendants.

1. Contract Clause Challenge

Plaintiffs allege that Section 375 abrogates the terms of plaintiffs' eleven collective bargaining agreements each of which contain a provision that:

> Bi-weekly salaries will be computed on the basis of ten working days.

See e.g., Complaint, Exh. A. at 134. This contractual provision is read in conjunction with Section 200(1) of the State Finance Law which mandates that "[t]he salaries of all officers of the state and the wages of all employees thereof shall be due from and payable by the state bi-weekly. . . ." N.Y. State Fin. Law § 200(1) (McKinney 1989). Plaintiffs thus assert a contractual right to continue being paid every second Wednesday for the ten working days comprising the preceding pay period and that being paid for only nine of those days under a lag payroll system is an unconstitutional legislative impairment of contract.

Defendants argue that there is in fact no contractual impairment. This Court agrees. Each of the collective bargaining agreements at issue also contains the following language as required by N.Y. Civ. Serv. Law § 204-a(1) (McKinney 1983):

> "It is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not

> become effective until the appropriate legislative body has given approval."

A fair interpretation of this statutory language is that the compensation sections of the collective bargaining agreements are provisions which "requir[e] legislative action to permit [their] implementation . . . by providing the additional funds therefor" because they require annual legislative appropriations in each fiscal year covered by the agreement. *See* N.Y. Const. art 7, § 7 ("No money shall ever be paid out of the state treasury . . . except in pursuance of an appropriation by law. . . .").

Plaintiffs argue that the only legislative "aproval" required under § 204-a(1) is the legislature's ratification of the terms of the collective bargaining agreements. *See, e.g.*, Act of Dec. 29, 1988, ch. 787, 1988 N.Y. Laws 1670 (McGuinness Aff., Exh. A). Plaintiffs take the position that once it ratifies the agreements, the legislature is bound to make sufficient appropriations to meet the contractual commitments. The Court rejects this argument.

There is ample support for the Court's interpretation of § 204-a(1) in the legislative history. Section 204-a(1) was not part of the original Taylor Law enacted in 1967 but was added as an amendment in 1969. The purpose of the amendment was:

> [to] obviate confusion as to the effect of an agreement between an employer and employee organization by making clear . . . that legislative action is needed before the agreement becomes effective as to those provisions requiring legislative approval such as, for example, the appropriation of funds for salaries.

Legislative Memoranda, Senate Rules Committee at 2365 (1969). This language is susceptible of but one meaning—that legislative appropriations are necessary before compensation or salary provisions of collective bargaining agreements become effective.

The parties do not dispute that for fiscal year 1990-91 the legislature's appropriation contemplated use of a lag payroll

system. The Report of Fiscal Committee on the Executive Budget utilized a lag payroll provision to adjust the Court System's budget prior to passage of the appropriation for the Court System. *See* Crosson Aff., Exh. B. The legislature passed Section 375 of Chapter 190 as companion legislation to ensure that the adjustment was effectuated in that manner. No contractual impairment arises from the legislature's imposition of a lag payroll system because the compensation provisions of the collective bargaining agreements did not become effective until after this legislation was enacted and the appropriation was passed.[1] *See Texaco, Inc. v. Short*, 454 U.S. 516, 531 (1982) (statute cannot unconstitutionally impair a contractual obligation that does not exist at the time of the statutory enactment).

If the Court's interpretation of § 204 is incorrect, it is necessary to consider whether the Contract Clause will have been violated as plaintiffs assert. Under *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977), an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. The state's determination of reasonableness and necessity, however, is accorded less deference when a state impairs a public rather than private contract. *Id.* at 26.

Even applying this stricter standard, it is apparent in this case that the impairment was a reasonable and necessary one. The state has faced and still is facing a budget crisis. In submitting the Court System's budget request for 1990-91, the Chief Administrator acknowledged "the state's precarious fiscal condition." Crosson Aff. ¶ 4 and Exh. A. The legislature had a legitimate interest in adjusting its fiscal allocations to the judicial branch to allow for increases in trial capacity

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1 Plaintiffs' reliance on *Jefferson County Bd. of Supervisors v. New York State Pub. Employment Relations Bd.*, 44 A.D.2d 893, 355 N.Y.S.2d 681 (App. Div. 1974), *aff'd*, 36 N.Y.2d 534 (1975), for the proposition that a public employer is forbidden from violating the terms of a collective bargaining agreement by refusing to appropriate funds is misplaced. The employer's conduct in *Jefferson County* was initially found to be an executive rather than legislative abrogation of contract rights. *See In re Jefferson County Bd. of Supervisors*, 6 N.Y.P.E.R.B. 3063, 3065 (1973).

and related support staff necessitated by the drug crisis while at the same time respecting other fiscal constraints on the state. *Id.* ¶¶ 4-6. Section 375 was a reasonable method of accomplishing these goals in the manner envisioned by the Fiscal Committee on the Executive Budget. *Id.* Exh. B. *See also Kirshner v. United States*, 603 F.2d 234, 239 (2d Cir. 1978) (no Contract Clause violation where state's purpose in enacting legislation modifying contract rights was to protect the fiscal integrity of the City of New York), *cert. denied*, 442 U.S. 909 (1979).

2. Due Process and Equal Protection Challenges

Plaintiffs contend that the lag payroll system violates the Equal Protection clause of the Fourteenth Amendment because Section 375 applies only to nonjudicial employees of the Unified Court System. Plaintiffs also appear to allege both substantive and procedural due process violations.

Rational basis review applies to both the equal protection and substantive due process claims. Since Section 375 neither burdens fundamental constitutional rights nor creates a suspect classification,[2] the statute need only be rationally related to legitimate government objectives. *See Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1972). Having found the lag payroll provision both reasonable and necessary under the Contract Clause, the Court cannot say that Section 375 fails to satisfy the rational basis test.

The Court also fails to detect a violation of procedural due process absent a showing by plaintiffs of clear entitlement every second Wednesday to bi-weekly payment of salary for the ten preceding work days. *See S & D Maintenance Co. v. Goldin*, 844 F.2d 962, 968-70 (2d Cir. 1988). Neither the computation provisions of the collective bargaining agreements nor N.Y. State Fin. Law § 200(1) create such an enti-

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2 Heightened scrutiny is only required in reviewing the constitutionality of statutes which make distinctions based on the suspect classes of race and national origin and the quasi-suspect classes of legitimacy and gender. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (collecting cases).

tlement given their dependency on legislative appropriations under N.Y. Civ. Serv. Law § 204-a(1).

CONCLUSION

Because plaintiffs have failed to make the requisite showing, plaintiffs' motion for preliminary injunctive relief is denied. Because there exist no issues of fact plaintiffs' motion for summary judgment is denied and defendants' cross-motion is granted.

IT IS SO ORDERED.

Dated: New York, New York
October 26, 1990

/s/ ROBERT P. PATTERSON, JR.
Robert P. Patterson, Jr.
U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 90-9036
Filed August 21, 1991

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of August one thousand nine hundred and ninety-one.

Present: HON. IRVING R. KAUFMAN,
HON. AMALYA L. KEARSE,
HON. GEORGE C. PRATT,
Circuit Judges,

ASSOCIATION OF SURROGATES, *et al.*,

Plaintiffs-Appellants,

—v.—

STATE OF NEW YORK, *et al.*,

Defendants-Appellees.

A petition for a rehearing having been filed herein by defendants-appellees, State of New York, Edward V. Regan, as Comptroller of the State of New York and Robert Abrams, as Attorney General of the State of New York.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 90-9036
Filed March 21, 1991

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of March one thousand nine hundred and ninety-one.

Present: HONORABLE IRVING R. KAUFMAN,
HONORABLE AMALYA L. KEARSE,
HONORABLE GEORGE C. PRATT,
Circuit Judges,

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK, MARY O'LEARY, PRESIDENT; CITYWIDE ASSOCIATION OF LAW ASSISTANTS, BARBARA BROWN, PRESIDENT; COURT ATTORNEYS ASSOCIATION OF THE CITY OF NEW YORK, ROBERT A. MULHALL, PRESIDENT; COURT OFFICERS BENEVOLENT ASSOCIATION OF NASSAU CO., JEFFREY POLLACK, PRESIDENT; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES & LOCAL 1070, PAUL SHELKIN, PRESIDENT; LOCAL 704, SERVICE EMPLOYEES INTERNATIONAL UNION, JOHN WALSH, PRESIDENT; NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION, ILA, LOCAL 2013, AFL-CIO, JOHN MCKILLOP, PRESIDENT; NINTH JUDICIAL DISTRICT COURT EMPLOYEES ASSOCIATION, MARTIN SHARP, PRESIDENT; SUFFOLK CO. COURT EMPLOYEES ASSOCIATION, INC., THOMAS F. MCGUINNESS, PRESIDENT; THE COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1180, ARTHUR CHELIOTES,

PRESIDENT; CIVIL SERVICE FORUM, LOCAL 300, SEIU, SALVATORE CANGIARELLA, PRESIDENT; JANET FOSTER, SUSAN GLASBRENNER, MICHAEL SULLIVAN, DAVID RICHMAN, GREG SNIGOR, JAMES DINAPOLI, WILLIAM ROSARIO, ABEL PELTRO, GEORGE F. BERGHORN, LISA ROSENZWEIG and MICHAEL SMITH,

Plaintiffs-Appellants,

—v.—

STATE OF NEW YORK; EDWARD V. REGAN, as Comptroller of the State of New York; ROBERT ABRAMS, as Attorney General of the State of New York; MATTHEW T. CROSSON, as Chief Administrator of the Unified Court System and the State of New York Unified Court System,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration of the briefs and records and the oral argument in this appeal, it is hereby ORDERED that the Clerk of the Court transmit to the Clerk of the New York Court of Appeals a Certificate in the form attached, together with a complete set of the briefs, appendix, and record filed by the parties with this Court.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman, *U.S.C.J.*

/s/ AMALYA L. KEARSE
Amalya L. Kearse, *U.S.C.J.*

/s/ GEORGE C. PRATT
George C. Pratt, *U.S.C.J.*

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 90-9036
Filed March 21, 1991

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 21st day of March one thousand nine hundred and ninety-one.

Present: HONORABLE IRVING R. KAUFMAN,
HONORABLE AMALYA L. KEARSE,
HONORABLE GEORGE C. PRATT,
Circuit Judges,

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK, MARY O'LEARY, PRESIDENT; CITYWIDE ASSOCIATION OF LAW ASSISTANTS, BARBARA BROWN, PRESIDENT; COURT ATTORNEYS ASSOCIATION OF THE CITY OF NEW YORK, ROBERT A. MULHALL, PRESIDENT; COURT OFFICERS BENEVOLENT ASSOCIATION OF NASSAU CO., JEFFREY POLLACK, PRESIDENT; DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES & LOCAL 1070, PAUL SHELKIN, PRESIDENT; LOCAL 704, SERVICE EMPLOYEES INTERNATIONAL UNION, JOHN WALSH, PRESIDENT; NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION, ILA, LOCAL 2013, AFL-CIO, JOHN MCKILLOP, PRESIDENT; NINTH JUDICIAL DISTRICT COURT EMPLOYEES ASSOCIATION, MARTIN SHARP, PRESIDENT; SUFFOLK CO. COURT EMPLOYEES ASSOCIATION, INC., THOMAS F. MCGUINNESS, PRESIDENT; THE COMMUNICATION WORKERS OF AMERICA, AFL-CIO, LOCAL 1180, ARTHUR CHELIOTES,

PRESIDENT; CIVIL SERVICE FORUM, LOCAL 300, SEIU, SALVATORE CANGIARELLA, PRESIDENT; JANET FOSTER, SUSAN GLASBRENNER, MICHAEL SULLIVAN, DAVID RICHMAN, GREG SNIGOR, JAMES DINAPOLI, WILLIAM ROSARIO, ABEL PELTRO, GEORGE F. BERGHORN, LISA ROSENZWEIG and MICHAEL SMITH,

Plaintiffs-Appellants,

—v.—

STATE OF NEW YORK; EDWARD V. REGAN, as Comptroller of the State of New York; ROBERT ABRAMS, as Attorney General of the State of New York; MATTHEW T. CROSSON, as Chief Administrator of the Unified Court System and the State of New York Unified Court System,

Defendants-Appellees.

Certificate to The New York Court of Appeals
(pursuant to McKinney's Revised 1991
New York Rules of Court § 500.17 (b)
—certification of unsettled
question of law)

Each of the plaintiff labor organizations is a party to a collective bargaining agreement with the State of New York ("State") Unified Court System for the period April 1, 1988, to March 31, 1991. Each agreement was approved by the State's Legislature by enacting legislation, *see* 1988 McKinney's N.Y. Session Laws Ch. 787, § 1, and the legislation was signed into law by the Governor. Each agreement provides, *inter alia*, for the payment of agreed upon annual wages with biweekly salaries payable on the basis of 10 working days.

In 1990, the Legislature enacted, and the Governor signed, a "lag payroll" law that provided, *inter alia*, that notwithstanding prior provisions of law,

> commencing with the last bi-weekly payroll period ending at least fourteen days before March 31, 1991 for

> each nonjudicial officer or employee, the salary or wages of such officer or employee shall be payable by the state two weeks after they shall have become due. Until such time, an alternative procedure for payment of the salaries and wages, to be determined by the comptroller, may be implemented in lieu of the procedure specified in [pertinent prior provisions] . . . .

L. 1990, ch. 190, § 375 ("§ 375"). Thereafter, in order to implement § 375, the State comptroller determined that commencing November 7, 1990, affected employees would be paid nine days' rather than 10 days' salary in each of 10 two-week pay periods, having the effect of withholding for each such employee two weeks' pay. The withheld pay would be repaid to the affected employees upon termination of their employment at the rate applicable to them at that time.

In October 1990, plaintiffs commenced the present action in the United States District Court for the Southern District of New York, seeking a declaratory judgment invalidating § 375. They contended principally that once the Legislature ratified the terms of the collective bargaining agreements, it was obligated to make sufficient appropriations to meet the contractual commitments; thus, they argued, § 375 abrogates the Legislature-approved collective bargaining agreements and hence violates plaintiffs' rights under Article I, § 10. cl. 1 (the "Contracts Clause") of the Constitution of the United States. The district court, reported at 749 F. Supp. 97 (S.D.N.Y. 1990), rejected plaintiffs' contentions and granted judgment in favor of the defendants. In rejecting the claim that § 375 violates the Contracts Clause, the district court relied on New York's Taylor Law, which, *inter alia*, required the collective bargaining agreements at issue here to include the following statement that

> [i]t is agreed by and between the parties that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor, shall not become effective until the appropriate legislative body has given approval,

N.Y. Civ. Serv. Law § 204-a(1) (McKinney 1983), and on N.Y. Const. art 7, § 7, which provides that "[n]o money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law." The court interpreted these provisions to mean that plaintiffs' contractual rights to payment do not come into existence until the Legislature has appropriated funds to pay those salaries. Thus, the district court concluded that the State's imposition of a lag payroll system did not violate the Contract Clause. It also ruled that if its interpretation of § 204-a(1) is incorrect, the impairment of plaintiffs' contracts was reasonable and necessary.

Plaintiffs have appealed to this Court, arguing that when a collective bargaining agreement has been negotiated by an authorized representative of the State, approved by legislative enactment, signed by the Governor, and executed by an authorized representative of the State, § 204-a(1) does not have the effect of preventing the covered employees' contractual salary rights from coming into existence until the State has appropriated the funds to pay those salaries.

The unsettled question that should be decided by the New York Court of Appeals is as follows:

> Does N.Y. Civ. Serv. Law § 204-a(1) make the compensation sections of collective bargaining agreements to which it applies conditional upon or subject to annual legislative appropriations?

This question should be decided by the New York Court of Appeals because it has serious implications for the obligations of the State with respect to its public employment contracts, because it requires interpretation of a State statute and the State construction, and because the issue has not yet been addressed by the State's highest court. The only precedent on the issue is the decision of the New York Supreme Court, Special Term, in *Quirk v. Regan*, 565 N.Y.S.2d 422 (N.Y. Sup. Ct. Albany County, Jan. 15, 1991), which, unlike the district court in the present case, declared § 375 unconstitutional. Counsel for the State of New York has assured us

that it intends to appeal the decision in *Quirk*. The State has a strong interest in having the issue certified decided by the State Court of Appeals rather than by the federal court, which may be mistaken. The question presented is likely to recur, and its resolution at this time by the New York Court of Appeals would aid in the administration of justice.

The foregoing is hereby certified to the Court of Appeals for the State of New York as ordered by the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
This day of March, 1991

/s/ ELAINE B. GOLDSMITH
Clerk,
United States Court of Appeals
for the Second Circuit

Supreme Court, U.S.
FILED
DEC 20 1991
OFFICE OF THE CLERK

(2)

No. 91-816

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK; Edward V. Regan, Comptroller of the State of New York; Robert Abrams, Attorney General of the State of New York,

Petitioners,

vs.

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION

SCHLACHTER AND MAURO
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QUESTION PRESENTED[1]

Where a Federal Court has declared a state statute delaying the payment of wages to State employees in violation of collective bargaining agreements to be a violation of U.S. Const. art. I, §10, can the Court order State officials to make payments on a current basis?

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[1] The "question presented" by the Petitioners is predicated upon the erroneous representation that the United States Court of Appeals for the Second Circuit ordered restitution of the wages which were withheld from November 7, 1990 through March 13, 1991 in order to implement the lag payroll law, which required that wages be paid two weeks after they have become due. As described more fully in the Statement of Facts, the 10 days' wages which were withheld were repaid on March 27, 1991 in lieu of paying the wages which were due for the two week pay period ending March 27, 1991. Wages which had been due on March 27, 1991 were paid two weeks later, commencing the lag payroll mandated by statute. Compliance with the Court order required only that subsequent to the Court order wages be paid when due, and the Petitioners complied with the Court order on October 23, 1991 by paying the wages due for the two week pay period ending on October 23, 1991 as well as the wages due for the two week pay period ending on October 9, 1991. (Petition, fn.2)

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No. 91-816

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF NEW YORK; Edward V. Regan, Comptroller of the State of New York; Robert Abrams, Attorney General of the State of New York,

Petitioners,

vs.

ASSOCIATION OF SURROGATES AND SUPREME COURT REPORTERS WITHIN THE CITY OF NEW YORK, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents respectfully pray that the Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on July 31, 1991 be denied.

STATEMENT OF THE CASE

The United States Court of Appeals for the Second Circuit reversed the judgment of the district court and remanded the case with instructions "to (1) enter a declaratory judgment declaring that New York's lag-payroll law violates the contract clause of the United States Constitution; (2) enjoin the continuing effects and application of the lag-payroll law; and (3) enter an appropriate judgment for the plaintiffs which shall include restitution of lagged wages for all affected employees" (20a).[2] The State of New York and Edward V. Regan, as Comptroller of the State of New York, have not challenged the declaration of unconstitutionality or the injunction and petition for a Writ of Certiorari only to review whether "the restoration of previously withheld wages constitute[s] retroactive monetary relief barred by the Eleventh Amendment". (Petition, question presented)

In arguing that the restoration of lagged wages violated the Eleventh Amendment, the Petitioners have described inaccurately the lag payroll statute, the manner it was implemented, and what was done by state officials to pay employees on a current basis in accordance with the Court order.

The collective bargaining agreements between the Respondent unions and the Petitioners require that employees be paid every second Wednesday for the two week period ending on the date of payment. The lag payroll statute, L. 1990 Ch. 190 §375, provides that commencing at least 14 days before March 31, 1991 "the salary or wages. . . shall be payable by the state two weeks after they shall have become due". Rather than implement the statute simply by skipping one bi-weekly paycheck, which would have resulted in employees not being paid for four weeks the Petitioners used an alternative procedure: they withheld one day's pay in each of the ten bi-weekly pay periods beginning with the pay period ending November 7, 1990 and continuing through the pay period ending March 13, 1991;[3] thereafter on March 27, the Petitioners returned to employees the money

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[2] References to "__a" are to the appendix of the Petition

[3] Joint Appendix filed in Court of Appeals (hereinafter "JA.____" 56, 88-89, 103)

withheld between November 7, 1990 and March 13, 1991 but did not pay wages for the period ending on March 27, 1991. Payment for the pay period ending on March 27, 1991 was made two weeks later, and thereafter wages were paid two weeks after they had become due.

This action was commenced on or about October 4, 1990 (JA. 4). The district court (Patterson, J.) granted judgment to the Petitioners herein on October 26, 1990 (34a). On July 31, 1991, the Court of Appeals for the Second Circuit reversed the judgment of the district court. On October 23, 1991, the Petitioners, in accordance with the lag payroll statute, paid employees for the two week period ending on October 9, 1991. On October 23, 1991, the Petitioners also paid employees for the two week period ending on October 23, 1991, thereby complying with the order of the Court to pay wages on a current basis. (Petition at 8.) The "restoration" was accomplished simply by paying on a current basis wages due subsequent to the order of the Court. The money which was "restored" to employees on October 23, 1991 was money which was due employees for the pay period ending on October 23, 1991 and did not represent the repayment of money withheld prior to the order of the Court.

REASONS FOR DENYING THE PETITION

The Petition for a Writ of Certiorari should be denied for three reasons: first, the relief ordered was prospective and does not raise a genuine issue under the Eleventh Amendment; second, the wages are now being paid on a current basis so that any issue which could have been raised is moot; and third, the Petition does not demonstrate any special and important reason for the grant of a Writ of Certiorari.

1. *The Relief Ordered by the Court was Prospective and does not Raise a Genuine Issue Under the Eleventh Amendment*

The Petition is predicated upon a misunderstanding by the Petitioners of the lag payroll statute, the manner it was implemented, and what was done to pay wages on a current basis.

The Court directed only that after the date of the Court order, payment be made on a current basis. Since the order is prospective and not retroactive, it is consistent with the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651, 665 94 S. Ct. 1349, 13 L.Fd.2d (1974).

The Court order required only that payments which were due subsequent to the date of the Court order be paid in accordance with the collective bargaining agreements, to wit: every second Wednesday for the two week payroll period ending on the date of payment. The Court order was, in fact, implemented on October 23, 1991 by the Petitioners by paying employees for the two week pay period ending on October 23, 1991. The only way that the Petitioners could have rescinded the lag payroll was to pay employees on a current basis. The payment made on October 23, 1991 brought the Petitioners into compliance with the order of the Court. Based upon the foregoing, it is clear that the Court did not order retroactive payments. Rather, the Court ordered that future payments be made on a current basis.

The Petitioners' claim that the "restored wages" were the wages which had been withheld between November 7, 1990 and March 13, 1991 is clearly erroneous. The statute provides that prior to March 31, 1991 "the salary or wages. . . shall be payable. . . two weeks after they shall have become due". The Petitioners acknowledge that "the two week lag commenced on March 14, 1991," (Petition at 4), referring to the first day of the first pay period for which wages were not to be paid on a current basis. The lag payroll was implemented by not paying on March 27, 1991 the wages due for the two week pay period ending on March 27, 1991, and by instead returning the money withheld during the previous ten pay periods. Thereafter the wages were paid two weeks after they had become due. If the state had continued to hold the money it had withheld from November 7, 1990 through March 13, 1991, then wages would thereafter have been paid on a current basis and not two weeks after they had become due. *Compare* the requirement that wages be paid 2 weeks after they have become due with the requirement in a subsequent wage withholding statute L. 1991, C. 166 §382, as amended by L.1991, C. 171, §1, that one day's pay was to be withheld during each

of five pay periods and repaid upon termination of employment, but that wages would be paid when otherwise due. The Petitioners argued to the Court of Appeals for the Second Circuit that the wages to be "restored" were the wages withheld between November 7, 1990 through March 13, 1991, and that Court explicitly rejected the argument (18a-19a).

The fact that the state has to spend money it would prefer not to have spent does not create a violation of the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. at 667-668. Based upon the foregoing, the Petitioners have failed to raise a genuine issue under the Eleventh Amendment.

2. *The Payment of Wages on a Current Basis has Rendered Moot the Only Issue Raised in the Petition.*

The Petitioners do not seek review of the decision of the Court of Appeals for the Second Circuit declaring that the lag payroll is unconstitutional and enjoining the continuing effects and application of the lag payroll law. The Petition is limited to challenging the jurisdiction of the Court to order what it alleges to be "a retroactive payment of moneys from the New York State treasury". (Petition at 8.) Since the Petitioners have already complied with the order to pay wages on a current basis, the defense is moot.

During the pendency of the appeal to the Court of Appeals for the Second Circuit, the lag payroll was implemented. While the case was *sub judice* the Petitioners raised the argument that the Court lacked jurisdiction since the lag payroll was fully implemented and no retroactive payment could be ordered from the state treasury. In its opinion, the Court of Appeals rejected this argument. No stay was requested. Thereafter on or about October 23, 1991, the Petitioners paid employees for the pay period ending October 23, 1991 as well as for the pay period ending October 9, 1991. (Petition at 5, fn. 2)

The law is well established that full compliance with an injunction amounting to the entirety of the relief sought renders

an issue moot. *Honig v. Students of Cal. School for the Blind*, 471 U.S. 148, 105 S.Ct. 1820, 85 L.Ed.2d. 114 (1985) (appeal moot because terms of preliminary injunction have been fully and irrevocably carried out); *Defunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d. 164 (1974) (appeal of order that applicant to law school be admitted was moot because he had irrevocably been admitted to final term of final year); *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed. 175 (1981) (appeal moot because terms of preliminary injunction have been fully and irrevocably carried out); *Murphy v. Hunt*, 455 U.S. 478, 102 S.Ct. 1181, 71 L.Ed.2d. 1932 (claim to pretrial bail was moot upon conviction); *Philadelphia Police and Fire Ass'n for Handicapped Children*, 874 F.2d. 156, 162 (1989) (appeal of contempt order requiring Pennsylvania to make two payments to the City of Philadelphia was moot after payments were made); *Koger v. U.S.*, 755 F.2d 1095 (4th Cir. 1985) (appeal of action to enjoin the Government from collecting assessed tax deficiencies and seeking release of tax lien was rendered moot by full payment of assessed deficiencies); *Olson v. U.S.*, 872 F.2d 820, 823 (8th Cir. 1989) (submission of materials in compliance with IRS summons renders moot any constitutional objection to compelled submissions); *Butcher v. Bailey*, 753 F.2d 465, 471 (6th Cir. 1985) (compliance with an order requiring debtor to turn over records in bankruptcy case mooted an appeal claiming privilege against self-incrimination); *Burnett v. Kindt*, 780 F.2d 952, 954-955 (11th Cir. 1986) (voluntary compliance by warden with *writ of habeas corpus* mooted relief).

Since the Petitioners do not challenge the declaratory judgment and the injunction, there is no question that any money withheld pursuant to the lag payroll statute would be lawfully due to the employees. It would be inequitable and inappropriate for any court to order the employees to repay money to which they are unquestionably entitled. The absence of any other possible relief for the Petitioners makes the defense now raised moot.

Moreover, the graveman of the Petition is that federal court lacks jurisdiction to compel a state to use state funds to make reparations for the past. Since the money has already been paid, there is no longer a question of compulsion. The state made

the payments after having raised the issues unsuccessfully before the United States Court of Appeals for the Second Circuit both on appeal and in a Petition for Rehearing. The State failed to seek a stay. The letter allegedly preserving rights cannot protect against the issue becoming moot. Eleventh Amendment rights can be waived. *Toll v. Mareno,* 458 U.S. 1, 102 S.Ct. 2977 73 L.Ed.2d. 563 (1982)

The Petition seeks review only of the order that money be paid out, and does not seek review of the declaration of unconstitutionality or from the injunction against the maintenance of the lag payroll. In the event that the Court finds the defense raised in the Petition moot the Respondents respectfully request that the Petition be disposed of in a manner that preserves the judgment since the judgment provides for unchallenged declaratory and injunctive relief.

3. *The Petitioners Have Not Demonstrated Special and Important Reasons for the Grant of a Writ of Certiorari*

This Court has clearly established the parameters of the relief which a federal court may grant in a law suit against a state. *Edelman v. Jordan,* 415 U.S. 651, 665 94 S.Ct. 1347, 13 L.Ed.2d (1974) and cases cited by the Petitioners at fn. 3, 4.

The decision below recognizes and does not depart from the well-established principles of law. Nor is the decision in conflict with the decisions of other Circuits since all of the decisions cited by the Petitioners apply the same legal principle and do not apply the standard differently.

At most the Petitioners dispute the Court's interpretation of the lag payroll statute, which in no way can constitute a decision which "has so far departed from accepted and usual course of judicial proceedings. . . as to call for an exercise of the Supreme Court's power of supervision." Rule 10 (1)(a).

CONCLUSION

The Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on July 31, 1991 should be denied.

Dated: Commack, New York
December 20, 1991

Respectfully submitted,

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